Federal Court  Cour fédérale

Date: 20100914

Docket: IMM-126-10

Citation: 2010 FC 908

Ottawa, Ontario, September 14, 2010

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

RASHED AHMED
SADAF KHURSHEED
UZAIR AHMED AND
USUMA RASHED AHMED

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] Mr. Rashed Ahmed (the Principal Applicant), his wife and two minor children (collectively, the Applicants) are citizens of Bangladesh who are followers of the Ahmadi-Muslim religion. The family came to Canada as visitors in May 2007 and claimed protection in June 2007 on the basis of their fear of persecution on the grounds of their religion.

[2] In a decision dated December 16, 2009, a member of the Immigration and Refugee Protection Board, Refugee Protection Division (the Board) determined that the Applicants were

neither Convention refugees nor persons in need of protection. The Applicants seek judicial review of the Board's decision.

[3] The key findings of the Board were as follows:

1. Except in respect of the claimant's assessment of current country conditions in Bangladesh, the Principal Applicant was credible.

2. Prior to 2006, the Applicants would have been found to be Convention refugees since, prior to that date, Ahmadis were persecuted and could receive little protection from the state.

3. Country conditions have changed in Bangladesh, in a meaningful and effective way, such that the overall situation for Ahmadis has been greatly improved.

4. Since the Applicants did not suffer incidents in Bangladesh that were so severe as to rise to the level of "appalling persecution" (*Canada (Minister of Employment and Immigration) v. Obstoj*, [1992] 2 F.C. 739 (C.A.)), they did not come within the "compelling reasons" exception of s. 108(4) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*).

5. The Applicants have not presented clear and convincing evidence to rebut the presumption of state protection.

II. Issues

[4] The Applicants do not challenge the Board's finding under s. 108(4). However, the Applicants challenge the remainder of the Board's decision. As argued by the Applicants, the issues to be determined in this judicial review are the following:

1. Did the Board err in its conclusion that there had been a change in country conditions in Bangladesh such that the Applicants would no longer suffer persecution if they were to return by:

    a. relying on out-dated information; and

    b. arbitrarily, and without explanation, rejecting documentary evidence filed subsequent to the hearing?

2. Did the Board err in its finding that harassment and discrimination suffered by the Applicants did not amount to persecution?

[5] For the reasons that follow, I am not persuaded that the Board's conclusions were unreasonable, as alleged, and dismiss this application for judicial review.

III. Analysis

A. *What is the Standard of Review?*

[6] On judicial review, it is important that the Court examine the decision of the Board as a whole. In this case, the Board determined that: (a) beginning in 2006, there had been a change in circumstances in Bangladesh; and (b) this change in circumstances had resulted in adequate state protection for Ahmadi-Muslims.

[7] The finding of the Board on changed circumstances is one of fact (see, for example, *Yusuf v. Canada (Minister of Employment & Immigration)*, [1995] F.C.J. No. 35 (F.C.A.) (QL), at para. 2). The finding of state protection is a question of mixed fact and law. For both determinations, deference is to be given to the Board, and the decision should be analysized on a standard of reasonableness.. On this standard, the Court should not intervene where the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47).

B. *Did the Board err in its finding on changed conditions?*

[8] The Applicants point to the fact that the documentary evidence relied on by the Board was dated in 2009, and relied on documents that were dated back to even earlier periods (post-2006). According to the Applicants, the change in government and corresponding change in circumstances in Bangladesh only occurred after the December 2008 democratic elections.

[9] A fundamental problem with the Applicants' argument is that it is based on a flawed understanding of the Board's decision. The Board assessed the change in country conditions over the period from 2006 to 2009, and not from the elections held at the end of 2008, as asserted by the Applicants. The Board, having reviewed the evidence before it, referred to government-supported initiatives and actions that began in 2006 and continued on into 2009. The Applicants appear to be arguing that the Board cannot consider any actions from the 2006 to 2008 period where there was a "military-backed, non-party caretaker government". I do not see why not. Under the auspices of this governmental regime, a number of initiatives took place that contributed to the change of circumstances in Bangladesh. Following its description of changes that took place during that regime, the Board examined whether these changes were continued by the government elected in 2008. The Board concluded that the changes continued, thus contributing to its conclusion that the changes were not temporary or transitory. This was a reasonable conclusion on the facts before the Board.

[10] The only questions remaining are: (a) the affect of post-hearing evidence filed by the Applicants; and (b) whether the Board made a forward-looking analysis.

(a) Post hearing Evidence

[11] The September 30, 2009 National Documentation Package (NDP) for Bangladesh had not been disclosed to the claimants prior to the hearing in October, 2009. At the close of the hearing, the Board provided the Applicants with the opportunity to provide post-hearing submissions and evidence on the questions of change of circumstances and state protection. The Applicants

then-counsel filed a one-page submission and numerous articles related to “the situation of Ahmadi Muslims, as well as growing extremism in general”.

[12] Before me, the Applicants acknowledge that this evidence was not ignored, but that the Board acted unreasonably in rejecting the post-hearing evidence filed by the Applicants.

[13] It was open to the Board to prefer some evidence over other evidence and, provided that the Board explains why it has preferred some evidence over other evidence, there is no error *(Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration*) (1998), 157 F.T.R. 35, [1998] F.C.J. No. 1425 (QL)).

[14] The fact that some (but not all) of the post-hearing evidence, provided by the Applicants, postdates the documentary evidence before the Board does not automatically mean that the Applicants’ post-hearing evidence should be preferred.

[15] Having carefully reviewed all of the evidence, including the post-hearing evidence, I am satisfied that the Board did not err in its assessment. In my view, the post-hearing evidence provided by the Applicants was unreliable or irrelevant to the issues before the Board. This post-hearing evidence is deficient in a number of aspects:

- The reports of isolated incidents of violence do little to rebut the presumption of state protection. The question that ought to have been addressed is whether the state is unable or unwilling to respond to the incidents of violence.

- In general, the evidence lacks reliability. The tone of the articles and language used by their authors are extreme and suggest a lack of objectivity. There is no evidence that the journals or authors cited generally provide independent, objective news reporting.

- Some of the evidence is dated. For example, the memorandum from Meer Mobashersher Ali refers to an incident in April of 1987. That memorandum contains only one reference to September 2009, without any observations of whether the alleged incidents were reported to the police. Another article (also very general in its focus) is dated December 28, 2008 and appears to be a personal blog.

- Some of the evidence is very general. For example, an article by Salah Uddin Shoaib Choudhury is entitled “South Asia, Militant Islam and Al Qaeda”. I fail to see the relevance of this article.

- Two of the articles describe the same attack on a mosque. While an October 15, 2009 article by “A Staff Reporter” states that the “manner of the police was completely bewildering”, another article, dated September 2009, refers to the fact that police were posted in the area after the attack and that “no other untoward incident has taken place”. The Board noted this inconsistency.

- The articles by Dr. Belkin are general in nature, and lack reliability. The Applicants made no attempt to provide the credentials of Dr. Richard Benkin, whose articles

> dated January 4, 2009 and October 4, 2009 were included in the post-hearing documents. It is clear, from reading these two articles, that Dr. Belkin holds very strong and negative views of the current government.

[16] In sum, the Board's preference for the documentary evidence over the post-hearing evidence is well-supported by the record.

(b) Forward-Looking Analysis

[17] The Applicants also argue that, although the Board stated that it must make a "forward-looking determination", it did not do so. Rather, the Applicants submit, the Board's analysis stops as of August 2009 – the date of the UK Border Agency Country of Origin Information Report. The Applicants refer to the cautionary words of Justice Richard Mosley in *Chowdhury v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 290, [2008] F.C.J. No. 368 (QL) at para. 13-14:

> A change in the political situation in a claimant's country of origin is only relevant if it may help in determining whether or not there is, at the date of the hearing, a reasonable and objectively foreseeable possibility that the claimant will be persecuted in the event of return.
>
> When coming to that decision, the RPD member must, however, have a view as to the stability and probability of continuation of the change in country conditions which resulted in the finding of a lack of risk. To do otherwise would put into harm's way those who flee the persecution of one side of an ongoing dispute. While the period in which their group is in the ascendance might be safe, the fragility of that safety is one issue which the RPD must consider in coming to their decisions. It does not appear from the decision that the member in the instant case directed her mind to that question.

[18] It is always difficult to look into the future. However, I am not persuaded that the Board failed to make that attempt. Having reviewed the durability of the changed circumstances between 2006 and 2009, the Board concluded that the change was “not a temporary or transitory one”. The Board then turned its mind to the future and observed that there was no evidence that the current “government under which Ahmadis have received protection . . . is in imminent danger of being overthrown or removed”. A review of the Certified Tribunal Record demonstrates that no evidence to the contrary was presented. In the case before me, the Board did not make the error described by Justice Mosley. In other words, the Board directed its mind to and made an assessment of the objectively foreseeable possibility that the Applicants would be persecuted upon their return to Bangladesh.

[19] I am further satisfied that the Board’s conclusion that state protection was available to the Applicants if they returned to Bangladesh was not unreasonable.

C. *Did the Board err by concluding that “harassment and discrimination do not constitute persecution”?*

[20] In the middle of paragraph 17 of its decision, the Board states that “harassment and discrimination do not constitute persecution”. The Applicants submit that this statement is wrong and that such treatment, particularly in the context of religious freedoms, can be persecution.

[21] In my view, the Applicants have taken this statement completely out of context. The sentence is contained in a paragraph in a section of the reasons dealing with changes in the situation facing Ahmadi-Muslims since the time when the Applicants lived and, later, visited Bangladesh. It

would have been better if the Board had qualified this statement to read something such as "harassment and discrimination do not always constitute persecution". However, read in the context of that part of the decision, I am not persuaded that the Board erred.

IV. Conclusion

[22] For these reasons, I am satisfied that the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at para. 47) and I dismiss this application for judicial review.

[23] I wish to commend both counsel in this application. In particular, the Applicants' counsel who appeared before me for oral argument – but not before the Board or at the leave stage. He vigorously, professionally and capably represented his clients.

[24] Neither party proposed a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is dismissed; and

2. no question of general importance is certified.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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